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Supreme Court of the United States

OCTOBER TERM, 1944.

JAMES KARL MUSCHANY and VERA MUSCHANY, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

No. 31

WILLIAM M. ANDREWS and BERTHA L. ANDREWS, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

No. 32

JOINT REPLY BRIEF TO BRIEF OF RESPONDENT.

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STATEMENT.

We, of counsel for the petitioners herein, find ourselves at variance with counsel for respondents with respect to certain matters set forth in respondents' statement and also in its argument as matters of fact, and we, therefore, respectfully direct the attention of the Court to such statements and to our points of disagreement therewith.

Respondent states that McDowell called a meeting of the landowners in the area, which was held on November 6, 1940, and attended by many of the landowners, their attorneys and interested persons. (Brief, p. 5.) In support of the proposition that McDowell called this meeting, appellant cites record pages 109, 115 and 141. These citations

do not support the proposition that McDowell called the meeting of landowners. In fact, the record discloses that the only persons who testified anything about said meeting were the following, all being witnesses for the Government: George Williams (R. 107), R. A. Langenbacher (R. 114), Thomas H. Rogers (R. 140), Rudolph H. Sinock (R. 151), Darby Tally (R. 189), Ford W. Thompson (R. 199, 201, 203, 204), and Joe Wentker (R. 206, 207), and that none of them testified that McDowell called said meeting or as to who called it. On the contrary the unnumbered paragraphs in the beginning of a letter being Government's Exhibit G-11 (R. 235, 236), and more particularly the fourth unnumbered paragraph of said letter, shows that said meeting was called by the committee described in the preceding paragraphs of said letter and that the committee invited McDowell to be present at this public meeting in order that he might answer questions on behalf of the War Department that might be asked by the farmers.

Respondent says (Respondent's brief page 6): "When McDowell sought to agree with the landowners upon the option prices, they followed the procedure outlined at the meeting and mentioned in the circular of the landowners' committee, i.e., they agreed upon the value of the property, and added to that the commissions, recorder's fees, and documentary stamp taxes." Respondent then cites record 127-131, 140-141, 150, 163, 167-168, 173, 186-188, 196-197 and price breakdowns at record 268-274, 328-332. These citations do not show the above quoted statement of respondent to be true of the transactions of either petitioners, Muschany or petitioners Andrews, nor does it show it to be true as to the transactions involved in the other two hundred and fifty-eight options. The record citations given by respondent are all that are available in the record in support of said statement, and in view of this state of the record, we submit that the percentage of accuracy in said statement cannot be very high.

Respondent says (brief, page 20): "McDowell generally accepted the owners' asking prices", and in support of the statement cites record 66-67, 140-141, 150, 163, 167-168, 196. An examination of the record as cited will show (R. 66-67) that Miss Callaway sought $125.00 per acre, and got an option for only $115.00 per acre. Record pages 140 and 141 shows that the price was arrived at by agreement, but is silent as to whether the landowner at first contended for a higher figure. The same is shown by the citation to record 150. The citations to record 163 and to record 167 and 168 and to record 196 seem to indicate that there was no argument as to price between McDowell and the respective owners.

The record shows that there were 270 separate parcels in the area (R. 280). There is testimony in the record as to price in only twenty-four tracts out of the 270, these cases being Sutton estate (R. 60), Callaway (R. 66), Kaut (R. 127, 128, 129, 130), Rogers (R. 140, 141), Sinock (R. 150), Walker (R. 163), Seib (R. 168, 169), Albrecht (R. 186), Kolodzey (R. 262), Muschany Brothers (R. 267, 268), Mary Keiser (R. 269), Nicolai (R. 270), Nell Fulkerson (R. 270), Mildred A. Stewart (R. 271), Lonergan (R. 271, 272), Morris Muschany (R. 272), Mary Schneider (R. 273), Darst Drainage District (R. 327, 328), Hamm (R. 328), Awbrey Heirs (R. 329, 330), Kessler (R. 330), Oscar L. Snyder (R. 331), Domineck Estate (R. 331, 332), Karl Muschany (R. 355), Andrews (R. 549, 550). In three of these cases—Callaway (R. 66), Albrecht (R. 186) and Andrews (R. 549, 550)—the record shows that McDowell or his agents did not consent to the first price, but got the owners down to a lower figure than they at first contended for. In three cases—Walker (R. 163), Seib (R. 167, 168) and Daniel (R. 196)—the record seems to show no contention between McDowell's representatives and the landowner as to price. In the other eighteen cases in which there was evidence as to price, the record is silent as to whether McDowell or his agents contended with the owners about the price. The

utmost that is shown then in support of appellant's statement that McDowell generally accepted the landowner's first figure is that in three cases out of 270 in the area McDowell submitted the owner's price without argument.

Respondent says (Brief, Page 20), "Another landowner was told by an agent of McDowell that the latter would himself like to add $50.00 an acre to the owner's asking price but the owner declined to adopt the suggestion." Respondent is referring to the Daniel testimony (R. 197). The testimony seems to show that the witness said in substance that after he had signed the option, McDowell's man said that he would like to add fifty dollars an acre more for the land—that it was worth fifty dollars an acre more; but that McDowell's man did not say that he would give him fifty dollars more, and that he, the witness, had told McDowell's man that the amount agreed upon was all he wanted. If this be the true meaning of the evidence it is somewhat different from the generous proposition by the land optioner and the righteous rejection thereof by the witness set forth in respondent's statement.

By way of conclusion of our statement, we desire to direct the attention of the court to the fact that there is no evidence in the record to show that any of these petitioners arrived at their option price by determining their net wanted price and adding the commission thereto, a mental process much abhorred by respondent throughout this litigation. There was such evidence as to other and unrelated transactions, which evidence was admitted over the objections of counsel for these petitioners.

We also submit that the record as a whole shows that the respondent Government sought to acquire the land and that petitioners did not seek to sell the land (R. 548-549). We submit that the letter contract between McDowell and the Government shows that the services performed by McDowell in these transactions were performed for the government and not for the landowner. (R. 231-233.)

SUMMARY OF THE ARGUMENT.

I.

Both the question as to whether or not the contracts in issue were under the cost-plus-a-percentage-of-the-cost system of contracting within the meaning of the prohibition of the Act of July 2, 1940 (54 Stat. 712, 50 U. S. C. A. App., Sec. 1171) and the question as to whether or not said contracts are contrary to public policy were predetermined in the negative by the War Department before entrance into same, and that determination was within the discretion of the War Department and was, therefore, final and conclusive and not subject to judicial review, and the Circuit Court of Appeals was therefore precluded from holding the contracts to be invalid on the ground that they violated said prohibition, or were contrary to public policy.

II.

McDowell was not the landowners' agent for the purpose of procuring a contract of sale from the United States of America, and the contract, therefore, did not violate the alleged principle of public policy forbidding contracts providing for compensation contingent upon success in procuring a contract with the United States.

III.

The contracts do not violate public policy by reason of any alleged conflict between the personal interests of McDowell, the Government's agent, and the interest of his principal, the United States of America, growing out of the commission provision, because: (1) he was a mere negotiator with no authority to bind the Government, and the Government had the present power to protect itself from the results of any selfish incentive that may have grown out of such alleged conflict of interests, by rejecting the option when submitted, and (2) Congress, by specific enactment,

recognized the legality of the system of acquiring land by payment of commissions to brokers on the basis of a percentage of the purchase price. (Section 11 of the Military Appropriations Act, 1942, 55 Stat. 366 l. c. 394, approved June 30, 1941.)

ARGUMENT.

I.

Cost-Plus-A-Percentage-of-the-Cost, and Public Policy Questions Predetermined by War Department, and Not Reviewable.

Respondent says: "The present contracts are in effect cost-plus-a-percentage-of-the-cost contracts for the acquisition of * * * land." (Brief, page 32.) Respondent also says in support of its contention that the contracts are contrary to public policy: "The obvious conflict between the interest of the Government and that of its agent entitles the United States to avoid the contracts if in its judgment it is advisable to do so to safeguard the public interest." (Brief, page 19.)

The questions as to whether or not the plan of acquisition, including the type of contract to be entered into between the Government and McDowell, and the type of contract between the Government and the landowner was prohibited by the cost-plus-a-percentage-of-the-cost prohibition, and as to whether or not it was against public policy, were decided by the War Department and by the contracting officer, in the negative, before the contract was entered into. The contracting officer was vested with discretion to decide these questions of law; being so vested with such discretion, if not directly by legislative enactment, then indirectly by inescapable inferences from specific legislative enactments imposing upon him the duty to enter into contracts, but to refrain from entering into certain types of contracts. This made it his duty (1) To enter into contracts and (2), before doing so, to decide whether the contract contemplated was

of the prohibited type and not to enter it if it was of that type, and it was just as certainly his duty to decide whether the contemplated contract was against public policy and to refrain from entering into it if it violated public policy. The record shows (R. 288) that he decided that the contract was not under the cost-plus-a-percentage-of-the-cost system of contracting, and it being his duty also to decide the public policy question, we submit that there is a presumption of law to the effect that he considered and he decided that question and determined that the contemplated contract was not contrary to public policy before entering into it. If it be true then that he was vested with the discretion to decide these questions, and if it be true that he exercised that discretion and determined that the contracts neither violated the cost-plus prohibition nor public policy, we submit that his determination of these questions was a final and conclusive determination not subject to judicial review, and that the Circuit Court of Appeals was precluded from finding to the contrary and declaring the contracts invalid. We submit that if administrative agencies cannot predetermine questions of law as to meaning of the many restrictions upon their contracting power both in the statutes and in the common law, there can be no security in contracting with the Government because whoever contemplated entering into a contract with the Government would have to employ a lawyer to ascertain whether it was in accord with a multitude of statutes and departmental regulations and with the common law. This, in turn, would greatly hamper the Government in its contracting activities, particularly in times of great national emergency when it is necessary for it to accomplish results quickly as was the case when the contracts in issue here were entered into.

In this connection we wish again to direct the attention of the court to *United States v. Speed*, 8 Wallace 77. In this case the facts were that an officer was required by Statute to advertise for bids before entering into a contract unless the emergency should be such as not to admit

of the delay incident to such advertisement. The officer entered into the contract without advertising for bids and subsequent events demonstrated that the thing contracted for was not needed at all and the Government repudiated the contract. The question as to whether the emergency was such as justified entrance into the contract without advertising for bids was a mixed question of fact and of law, for the contracting officer to determine before entering into the contract. The question of fact was the extent of the emergency. The question of law was whether the extent of the emergency was such as to bring the act of waiving the advertisement for bids within the permissive exception of the Statute. This Court, speaking through Mr. Justice Miller, said:

> "It is too well settled to admit of dispute at this day that where there is a discretion of this kind conferred on an officer or a board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise."

It can be readily seen that this court in that case held the contract valid even in the face of the fact that subsequent events demonstrated that the Army had had no use for the meat provided for, said holding being based upon the fact that it was a discretionary determination within the power and authority of the contracting officer, and that the validity of a contract flowing from such a determination does not depend upon the correctiness of the determination.

In like manner 54 Stat. 712, and Title 50, Sec. 171 imposed upon the Secretary of War the duty to determine how and when he should acquire land, and if he determined he should acquire it by contract, said 54 Stat. 712 prohibited him from entering into any contract under the cost-plus-a-percentage of the cost system of contracting, and the public policy prohibited him from entering into any contract contrary to public policy; and we submit that he was, therefore, under

the doctrine of this court expressed in the opinion above cited, confronted with the duty and vested with the discretion to determine whether the contemplated contract was of the type prohibited by the cost-plus-a-percentage-of-the-cost prohibition, and whether it was contrary to public policy. We submit that the record shows that he determined the first question in the negative (R. 288), holding that the contemplated contract was not contrary to the cost-plus-a-percentage-of-the-cost prohibition, and that there flows from the fact that he entered into the contract a presumption of law to the effect that he determined the second question in the negative, holding that the contemplated contract was not contrary to public policy, and we submit that both determinations were final and conclusive, and not subject to judicial review, and that the Circuit Court of Appeals was precluded from holding the contracts to be invalid either as against public policy or as against the statutory prohibition.

We submit that the doctrine of the non-reviewability of administrative acts performed in the course of the transaction of the ordinary business of the Government is proclaimed in the opinion of this Court in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, set forth on page 27 of the original Andrews brief, wherein Mr. Justice Black, speaking for the Court, says:

> "Judicial restraint of those who administer the government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of the Government."

We submit that if the Court will not restrain an act, it will certainly not, at a later date, invalidate that act.

II.

Contracts in Issue Here Do Not Constitute McDowell Landowner's Agent for Purpose of Procuring Sale of Land to the Government.

Respondent contends that the contracts in question violate a rule frequently applied by this court, that contingent fees for the procurement of Government contracts are contrary to public policy, and that they violate the Act of July 16, 1862, 12 Stat. 577, making it an offence for any officer or agent of the United States to receive or agree to receive from any person any money or other valuable consideration for "procuring or aiding to procure any contract from the United States or from any officer or department thereof," and Respondent says that any such contract or agreement may, according to the provisions of the Statute, at the option of the President, be declared void. (Brief, pages 11 and 23.)

In this connection we wish first to point out that we have never contended that petitioners were unaware, at the time of the negotiation of the contracts, of the fact that they were to pay the Government's commission obligation to McDowell along with the other expenses of the sale out of the gross sales price. The face of the contract provided for this and petitioners were aware of the provisions. What we have contended is that petitioners did not go through the mathematical process of figuring the five per cent commission on a net wanted price and adding the figure arrived at to the net wanted price, and thereby arrive at the gross sales price stated in the option. We desire to make it very clear, however, that we contend that if petitioners had gone through that mathematical process in arriving at the gross sales price, that fact would not invalidate their contracts, because, under the law, the Government had a right to pay a commission to a broker in the course of land acquisitions, and it made no difference whether it paid it directly or indirectly. We submit that the statute quoted on page 32 of

the original Andrews brief and hereafter to be discussed, shows plainly that the Government had the right to pay such commissions. In the light of the foregoing comments, we respectfully point out that petitioners did not employ McDowell as their agent to procure contracts of sale from the Government. We submit that there was no dual agency and that McDowell was not the agent of the landowner, but of the Government alone. There is no contract of agency between McDowell and the landowner. He was not engaged by the landowner to procure the contracts from the Government. The contract between the landowner and the Government which respondent construes to be a contract of agency between McDowell and the landowner is not signed by McDowell. While the landowner in said contract agrees to pay McDowell a commission of 5 percent of the gross sales price as full payment to McDowell for services rendered in procuring the sale, preparing the deed and arranging for settlement and closing of the transaction, we submit that those services were all rendered or to be rendered by McDowell to his principal, the United States of America, and were not rendered to the landowner. The landowner had no need for an agent to procure a sale of the land to the Government, but the Government had need for an agent to procure a sale by the landowner to the Government. The Government was insisting that the landowner sell, and sell quickly, and get out immediately, and was appealing to his patriotism in order to induce him to part with his cherished possessions. If the landowner could have, with any hope of success, employed an agent to induce the Government not to disturb him in his possessions, but to go elsewhere with its project, he would have been happy to do so.

Can anyone believe that when families were distressed because they had to leave their homes, the heads of families were employing a soliciting agent to procure a sale of their homes to the Government? There was to be a great and righteous war for the protection of the homes of America. Can anyone believe that two hundred and seventy land-

owners, in a peaceful rural community, most of them home-owners, were employing an agent to procure a sale of their property?

The thing that the landowners contracted with the Government to do in the aforesaid provision of said contract was to pay its agent McDowell out of the gross sales price the 5 per cent commission that it had agreed with McDowell in its contract with him (Government's Exhibit M-5, R. 232) should be the sole compensation for his work under said last-mentioned contract, just exactly as said landowners contracted in other provisions of their contract with the Government to pay the other expenses of the sale.

This is borne out not only by the contract between the Government and McDowell, but by the testimony of Col. Valliant (R. 209) to the effect in substance that it was understood when the plan was devised that the landowner might take into consideration the commission to McDowell when he fixed the gross price and that that commission, along with other expenses of the sale, would be paid by the landowner out of that gross sales price in order to save the Government the trouble and delay of preparing several different vouchers.

It is clear then that the landowner employed no agent under a contingency contract for the purpose of corrupting Government officials, as was done in some of the cases cited by Respondent in its brief.

Furthermore, the contract between the landowner and the Government did not become a completed contract until approved, accepted and adopted by Col. Valliant, and when that was done McDowell's right to 5 percent of the gross sales price was vested and not contingent.

We submit further that if McDowell, because of the aforesaid provision of said contract, had been an agent of the landowner as well as of the Government, such dual agency would have been known to the Government; and, in view of the fact that the Government had the right to reject the options, could have done no harm. *United States* v. *Grace Evangelical Church*, 132 Fed. (2nd) 460 (C. C. A. 7, 1943.)

III.

The Contracts Do Not Violate Public Policy by Reason of Alleged Conflict Between McDowell's Self Interest and the Interest of His Principal, the United States of America Because of the Commission Provision.

It is contended by respondent (Brief, pages 13 and 14), that a conflict was established between the self-interest of the Government's agent and his duty to serve the interest of his principal, the United States of America, and that this conflict renders the contracts void as against public policy. In support of this proposition respondent cites the dissenting opinion of Judge Evans in *United States* v. *Grace Evangelical Church*, 132 Fed. 2nd 460. The majority opinion in that case, however, held a similar contract not to be contrary to public policy. Further more, the same case was heard by the same Court on a second appeal with like result, having been decided on August 2nd, 1944, being Case No. 8443, October term 1943, April Session 1944, and being not yet reported.

In further support of this proposition they cite the testimony of Under Secretary Patterson given April 29, 1941, before the subcommittee of the Committee on Appropriations, House of Representatives, 77th Congress, 1st Session, on the Military Establishment Appropriation Bill for 1942, P. 80. (Respondent's brief, pages 15 and 16.) In this connection we direct the court's attention to the fact that an examination of this testimony shows that it was given long after the Weldon Spring property and the property involved in the other seven land acquisition projects, in which the same method of acquisition was used, was acquired (R. 288). When the Under Secretary testified, the great rush was over. He had the land needed and was in a position to devise what he considered more wise plans of acquisition, but he did not go so far as to say that the plan under which he had acquired many thousands of acres of land in eight different and widely scattered projects was contrary to public policy.

Respondent quotes Under Secretary Patterson in his testimony before said committee as characterizing the commission system of land acquisition as "a system that I will not defend" (brief, p. 16). Under Secretary Patterson did so mention the system in his testimony on Page 106 of the report of the hearings before the aforesaid subcommittee of the Appropriations Committee of the House, but the fact that he would not defend it does not make it contrary to public policy. He also made the following statement as shown by page 76 of the same report: "We hold no brief for the cost-plus-a-fixed-fee plan for building camps. We use it when pressed for time which was doubtless the use contemplated by Congress in authorizing such contracts". The Secretary held no brief for cost-plus-a-fixed-fee contracts and he refused to defend the system of acquiring land by paying a commission on the purchase price to an agent, but he recognized that both systems were legal and he wanted to hold on to both systems for use in emergency. The very act of Congress with reference to which he was then testifying which had not been enacted on April 29, 1941, the date of his testimony, but which was approved on June 30, 1941, being the Military Appropriations Act, 1942, 55 Stat. 366 l. c. 394 contained the following provisions, being Section 11 thereof:

> "No part of any money appropriated herein or included under any contract authority herein granted, shall be expended for the payment of any commission on any land purchase contract in excess of two per centum of the purchase price."

We now direct the Court's attention to the fact that when the Under Secretary was testifying before the above mentioned Committee, the following question and answer occurred as appears on page 106 of the report of said hearing:

> **Mr. Snyder**—You referred in your Senate testimony to commissions on land purchase contracts. The Navy

Appropriations Bill for 1942, as it will become law, carried a 2 per cent maximum. That probably may have to be written into this bill. Have you any comment to make on that?

Mr. Patterson—I would rather not see the limitation in. We are now buying most of our land through the Soil Conservation Service of the Department of Agriculture. The costs vary under that procedure according to the efficiency of the agents employed by the Conservation Service. **I regret very much to say that on the first ones the costs were quite in excess of what we had been paying real estate agents under a system that I will not defend.** Due either to putting too many men on the job, or the men not having enough to do, General Somervell told me that the costs had run up **as high as 10 per cent.** (Emphasis supplied.)

We submit that it appears from the foregoing that the Under Secretary considered the system which he would not defend to be nevertheless legal and a useful system to hold on to for use in emergency, and was even unwilling to have the statutory restriction of the commission enacted into law.

Not only did the War Department oppose the limitation of the commission to 2 per centum of the purchase price before the subcommittee of the Committee on Appropriations of the House, but as shown on pages 46 to 49 inclusive of hearings before the subcommittee of the Committee on Appropriations, United States Senate, 77th Congress, First Session, H. R. 4965, a bill making appropriations for the military establishment for the fiscal year ending June 30, 1942, and for other purposes,—General Brehon Somervell appeared before the subcommittee on June 21, 1941, and opposed said limitation of real estate commissions. The following is an exact copy of the testimony:

General Somervell. . . .

The second point is not so important. It is with respect to the limitation of 2 percent on commissions on real estate, the limitation which is contained on

page 71, section 11, lines 13 to 17, in the print the members of the committee have before them, and on page 72, lines 12 to 16, in the print which I have.

We can get along all right with that limitation, except on the small projects, **and except in those cases where it is necessary to get property very promptly. In those cases we would like to have authority to pay a little more than 2 percent.** It is obvious that if you have a big job 2 percent is ample for any commission you have to pay; but if we find it desirable to include the cost of the surveys and of abstracts in a lump-sum contract with a broker, then this 2-percent commission requirement would be a handicap. (Emphasis supplied.)

However, I do not want to stress that point too much. I merely want to say that we can operate more expeditously without that limitation, and that we can give you our assurance that we will not pay more than 2 percent except in the cases I have indicated.

Senator Thomas: You are speaking about commissions on real estate transactions?

General Somervell: Yes, sir.

Senator Thomas. Does the bill prescribe a limitation of 2 percent?

General Somervell. Yes, sir.

Senator Thomas. You think that limitation should not be in the bill?

General Somervell. Yes, sir. We certainly do not intend to pay more than that, except in a case where we have a small job involving a large number of contracts, in which case we think perhaps that limitation would be too restrictive.

Senator Thomas. You think the restriction serves no good purpose; is that correct?

General Somervell. Yes, sir.

Senator Thomas. While you are discussing this same matter of commissions, let me mention the fact that the bill provides 7 percent, as I recall, as a limitation upon the commissions to be paid to contractors and engineers. Is that correct?

General Somervell. Yes, sir; 6 percent of contractors and engineers and 7 percent for an operating contract.

Senator Thomas. The same arguments you urge against the 2-percent limitation would likewise be ap-

plicable to the limitation to 6 percent and 7 percent, would they not?

General Somervell. No, sir. Those are all right. You can leave those as they are.

Senator Thomas. Is it not a fact that sometimes on small jobs you find it necessary to pay more than a 6-percent or a 7-percent fee?

General Somervell. No, sir. That is enough.

Senator Thomas. Then the 6-percent and 7-percent fees are all right?

General Somervell. Yes, sir; that is enough. Another 7-percent restriction is mentioned in there, and I should like to speak about it. But so far as these fees are concerned that limitation is all right.

Senator Adams. With reference to the matter of commissions, of course in our ordinary civil activities commissions ordinarily are paid to an agent by the seller.

General Somervell. That is correct; **but when it is a forced sale, which is the case in practically all our transactions, there is no impetus from the seller through the broker,** as there is in the case of the ordinary civil transaction. (Emphasis supplied.)

Senator Adams. And at times you use the broker to secure options without the seller knowing that the property is to be used for Government purposes?

General Somervell. We try to keep it quiet. You know how difficult that is.

Senator Adams. Yes.

General Somervell. But our primary use for brokers is in situations in which **we have more or less exhausted the Government facilities available for acquiring the real estate.** We use the Department of Agriculture and the other War Department agency, the Corps of Engineers, to make surveys and to get abstracts and things of that kind. **We have gotten to the point where we have all this personnel involved in the picture.** In other words, there is no need for us to ask the Corps of Engineers to acquire some land for us, because all they would do would be to use the same people all of us are using. All of us are using the Government people for that purpose. (Emphasis supplied.)

Under similar circumstances we can go to a private broker and can get the thing done **a lot faster and a lot**

cheaper, in the over-all picture, than we could by attempting to hire new people in the Government service. That is the whole story. (Emphasis supplied.)

Senator Thomas. General, let me call your attention to section 7 of Public Law 48 of the Seventy-seventh Congress, which reads as follows:

"No part of any money appropriated herein or included under any contract authority herein granted shall be expended for the payment of any commission on any land purchase contract in excess of 2 per centum of the purchase price."

If this bill should carry a similar provision how would that affect your work? Would it affect it adversely?

General Somervell. It would slow us up in the purchase of small tracts. That is what it would do. [Emphasis supplied]

Senator Thomas. During the next fiscal year how many small tracts do you think you will have occasion to purchase, if any?

General Somervell. Probably 20.

Senator Thomas. What will be the effect if this language remains in the bill?

General Somervell. It will mean that we shall have to get the employees in our Department to carry on those negotiations, **if we cannot get brokers to do the job at 2 percent.** [Emphasis supplied]

Senator Adams. To what extent have you had recourse to condemnation proceedings?

General Somervell. We are doing so as a fixed principle, Senator. In other words, when we go in to take a large tract, under our present policy we file a declaration of taking, and put the whole job under condemnation. Having done that, we proceed to negotiate with the owners, on the basis of the appraisals which formed the data on which we filed.

Senator Adams. And the commission is paid to the agent or representative who negotiates for you?

General Somervell. Yes, sir.

Senator Adams. After you really commence your condemnation proceedings?

General Somervell. When we resort to condemnation proceedings, of course the broker is not in the picture at all. Occasionally we hire a man for closings,

but on those closings the man is hired as an employee of our office, and not as a broker. We pay him a fixed salary. The only times we use a broker are in cases in which, **for reasons of speed and because we have a property offered to us at a price we can accept, we do not have to resort to condemnation.** [Emphasis supplied]

Perhaps this is getting a little confusing. Our fixed policy is to resort to condemnation as a general rule. When we do not resort to condemnation, that is the exception; and under the exception we hire brokers occasionally to do the job. As I have said before, this is not a very serious restriction, but it is a restriction. . . ."

We submit that in the position taken both by Under Secretary of War Patterson and General Somervell it is crystal clear that neither of these gentlemen considered the commission system of acquisition illegal or contrary to public policy, and that Congress, by enacting the above quoted statute, overrode all possible questions as to its exclusion from the prohibition against contracts under the cost-plus-a-percentage-of-the-cost system of contracting and as to its harmony with public policy, and affirmed the legality of the system.

The Weldon Spring acquisition clearly falls within the meaning of the testimony of General Somervell when he spoke of "those cases where it is necessary to get the property very promptly" (R. 302, 303).

Respondent contends, however, that the above quoted statute does not mean what it says or, in other words, that instead of meaning to limit the commission of two per centum of the purchase price, it means to limit it to two per centum of the estimated price (Brief, page 34).

In support of this theory Respondent cites the method sometimes used for fixing the fees of engineers and architects, whereby the cost of the thing to be constructed is estimated and the fee of the engineer or architect is fixed by calculating a given percentage of that estimated cost and fixing the amount arrived at as the amount of the fee.

We submit, however, that this method of fixing the fee in a cost-plus-a-fixed-fee contract cannot be taken as a model for use under the statute above quoted, for the reason that said method is based upon a specific statutory provision applying to cost-plus-a-fixed-fee contracts which is entirely apart from the statute pertaining to commissions on land purchases. The specific provision referred to is embodied in the Act of September 9, 1940, 54 Stat. 872, l. c. 873, known as the Second Supplemental National Defense Appropriations Act, 1941, and is in the following words:

> "PROVIDED, FURTHER, that the fixed fee to be paid the contractor as a result of any such public works contract hereafter entered into shall not exceed 6 per centum of the *estimated* cost of the contract, exclusive o fthe fee, as determined by the Secretary of War." (Emphasis supplied.)

We submit that had the word "estimated" been left out of the last quoted provision, it would have been impossible to fix the fee in advance by a percentage method because the cost cannot be definitely known until completion of the project. The word "estimated" was left out of the commission-limitation statute and it is therefore impossible to fix the commission in advance in dollars and cents because the purchase price cannot be known in advance. It may be that if Congress had not recognized the fact that purchase prices cannot be estimated in advance, it would have inserted the word "estimated" before the words "purchase price" in the commission-limitation provision.

We submit that while legislative history cited by Respondent does not bear out its construction of the commission-limitation statute, nevertheless even if it did so, the plain meaning of the English used in said statute should prevail in construing it. It has been held by this Court that in construing a statute the intention of Congress is to be ascertained by the light of the meaning of the English used in the Act rather than by the light cast upon the subject by reference to its legislative history; *United States* versus

Trans-Missouri Freight Association, 41 L. Ed. 1007 l. c. 1020, 166 U. S. 290.

Before concluding our argument we deem it appropriate to take note of some comments contained both in respondent's brief and in the opinion of the Circuit Court of Appeals, whereby it is sought to deduce, from testimony extraneous to the cases at bar and relating to wholly different transactions, which testimony was allowed to be incorporated into the record over the objection of counsel for petitioners herein, with due exception taken, certain inferences tending to reflect both upon the wisdom of the plan of acquisition and the integrity of the Government's agent McDowell. Both respondent (Brief, pp. 20 and 21) and the opinion of the Circuit Court of Appeals (R. 697) refer to the Daniel testimony (R. 197) and both of them apparently undertake to draw an inference from it to the effect that McDowell's representative was endeavoring to induce Mr. Daniel to demand an additional $50.00 per acre for his land. We submit that the evidence warrants no such inference. An examination of the record will show that Mr. Daniel said, in substance, that there was no argument between him and McDowell's man about the value of the property before the option was signed but that after the option was signed, McDowell's man commented that he would like to add $50.00 per acre more for the land, that the land would be worth $50.00 per acre more, but that McDowell's man did not say that he would give it to him.

We submit that under this state of the evidence it is entirely reasonable to believe that McDowell's agent, who in turn was the agent of the Government, was conscientious in the belief that the price asked by the landowner was less than the value of the land, but understanding that it was the prerogative of the landowner to fix the price, and feeling an obligation to his principal to resolve all doubts in favor of the Government, refrained from expressing his opinion as to value until after Mr. Daniel had signed the option, and then expressed his opinion but made no offer to raise the price.

We submit that it is entirely possible that Mr. Daniel's land was worth more than he asked. The record shows that Mr. Daniel was a non-resident landowner living in St. Louis (R. 195). He may have been mistaken as to the value of his land as non-resident landowners frequently are. The record shows that a new highway bridge across the Missouri River and a superhighway had recently been constructed near this area (R. 595), and the record shows further by the testimony of the Government's witness, Warren R. Dalton, that the value of the Andrews tract, another tract in the Weldon Spring area, had increased 300 percent by reason of the said new bridge and superhighway (R. 603).

Under this state of facts it is entirely possible that there had been an enhancement in the value of the land which was not fully appreciated by Mr. Daniel. In this connection it should be remembered that Mr. Daniel's property consisted of a 3-acre tract with a house on it and that an increase of $50.00 per acre would amount to only $150.00, and it would not be remarkable in view of the circumstances above outlined if Mr. Daniel had underestimated its value to that extent.

We, therefore, submit that in view of the foregoing the most harsh inference that might be drawn from the facts as to the conduct of McDowell's man on this occasion is that in view of his position as an agent for the Government it might have been slightly indiscreet for him to indicate to Mr. Daniel that he, Mr. Daniel, had made anything but the best possible bargain in his sale to the Government.

We next allude to the reference to the Kolodzey deal cited by respondent (Brief p. 20) and by the Court of Appeals (R. 697) whereby both apparently undertake to draw an inference that McDowell acted selfishly in the transaction from the fact that he first recommended an offer to sell the property to the Government for $4500.00, and thereafter recommended an offer to sell the same property for $10,000.00, and later when condemnation was under consid-

eration recommended a declared value in the contemplated condemnation suit of $4800.00.

We submit that bare facts unexplained are sometimes susceptible of erroneous construction. An examination of the facts shown by the record (R. 262-267) reveals that Martha Pallardy, purporting to be attorney-in-fact for Agnes Kolodzey, who lived at Yorktown, Texas, executed an option as to a certain tract of land in the Weldon Spring area as attorney in fact for said Agnes Kolodzey agreeing to sell the land described to the United States Government for $4500.00. McDowell, under date of November 19, 1940, transmitted said option to Colonel Valliant, the contracting officer in the War Department, recommending acceptance of said option as representing "a fair value to the United States Government". The option was accepted. Thereafter the Kansas City Title Insurance Company discovered that the power of attorney under which Martha Pallardy was purporting to act was four and one-half years old. McDowell contacted Miss Kolodzey directly immediately after that and was informed that she had executed a power of attorney to Martha Pallardy to execute leases in connection with a rock quarry on the property, but that she had not been consulted about selling the land to the Government for a TNT plant.

She said she would not cooperate in a sale for the figure fixed by the attorney in fact but would sign another option offering to sell her land for $10,000.00. McDowell accordingly took into consideration the fact that adjoining land was being optioned to the Government for $50.00 per acre more than the amount fixed by the attorney in fact, and by letter of January 11, 1941, recommended acceptance of an option naming a price of $10,000.00 as "a fair value to the United States Government". The second recommendation was not accepted by the Quartermaster General's Department, and by letter of January 18, 1941, Major Harrold, of the Quartermaster's office, wrote McDowell to forward his

request for condemnation of the Kolodzey tract. Accordingly, by letter of February 26, 1941, McDowell wrote to the Office of the Quartermaster General that in view of the fact that the land would have to be condemned by the Government, it was his opinion that $75.00 per acre would be a fair appraisal value. The price of the tract at $75.00 an acre, amounted to $4800.00.

We desire to comment that it is apparent that McDowell had committed himself to the proposition that the sale at $4500.00, offered by Martha Pallardy, the attorney in fact, represented "a fair value to the United States Government" but he had not committed himself to the proposition that it represented *a fair value* to the owner Agnes Kolodzey. Therefore, a later statement that an offer of Agnes Kolodzey to sell at a price of $10,000 was on a basis representing "a fair value to the United States Government" was not inconsistent with the earlier statement, because the fact that the lower price represented a fair value to the Government, did not necessarily indicate that the higher price was not also a fair value to the Government.

We submit that after that, when he recommended $75.00 per acre, or $4800.00, as a fair appraisal value for the purposes of condemnation, he was probably taking into consideration the fact that as a practical matter the condemnor always contends for a low price in a condemnation suit and the condemnee always contends for a high price, and that the result is usually an award somewhere in between the two figures. He was also probably taking into consideration the fact as indicated by the language in his letter "in view of the fact that the Government will have to obtain this land through condemnation, it is our opinion that $75.00 per acre is a fair appraisal for the land" that the measure of value in condemnation limits the value to market value whereas when the Government undertakes to purchase at a negotiated price the will of the seller is a potent factor.

We submit that an examination of this transaction reveals nothing reflecting upon McDowell's integrity as an agent for the Government, but if it should be held to be such a reflection it serves to vindicate the plan of acquisition, because the record shows that the contracting officer performed his function and rejected the $10,000 option recommended by the agent.

Respondent says (Brief p. 18) "the prices recommended by McDowell were not checked by any appraisals or any first-hand investigation of the particular tracts; or record of sales in area; at most the prices were subject to comparison one with another on the basis of the bare recommendations of McDowell (R. 277, 281, 283, 305, 311) * * *. In these circumstances the critical nature of McDowell's negotiations is readily evident. *United States* versus *Carter*, 217 U. S. 286, presented a similar situation with respect to administrative approval of contracts tainted with a conflict of interest on the part of the Government's agent".

We comment that the portion of the foregoing statement purporting to be a statement of the facts as shown by the record does not present the whole truth. The record shows that Colonel Valliant, the contracting officer, went in person to the area and "drove around and over and criss-crossed throughout the site" in order "to examine the proposed site and familiarize myself with its topography and condition, agriculturally especially, and anything else that might be of value to me in considering the price that would be fair to pay for the land." (R. 291.)

We submit that it might well be true that in view of the great urgency for speed in acquisition this was the maximum that could be done by the Department through its contracting officer in the way of acquiring necessary information. Scientific appraisals require much time, and while they are desirable under ordinary circumstances there appears to be no law establishing them as a condition precedent to a purchase of land by the Government. If this be the true state of the matter, then certainly it is also true

that the landowners were not responsible for that condition of affairs.

On the other hand, if this was not the true state of affairs and if as a matter of fact the necessity for speed in acquisition was not so compelling as to justify dispensing with appraisals and other informative processes often used, then and in that event the principle voiced by this Court by Mr. Justice Murphy in *United States* versus *Bethlehem Shipbuilding Company*, 315 U. S. 289, to the effect that the United States is "armed with both an actual nad potential arsenal of powers adequate to protect it in dealing with private persons" is entirely applicable and if it did not avail itself of those powers it, itself, is at fault in not so doing and the landowner is not chargeable with blame for the Government's default in the matter. The landowners when confronted with the necessity of vacating their property and finding other homes were justified in leaving the performance of Departmental duties to the War Department.

With reference to *United States* versus *Carter*, 217 U. S. 286, cited as aforesaid by respondent to establish its claim that "it is no answer to suggest that the contracts were approved by an Officer of the War Department after submission by McDowell" (Brief p. 17), we submit that the difference in the essential facts of that case from the facts in these cases make the finding of the Court in that case inapplicable for the purpose for which it is cited.

In that case the agent was definitely guilty of fraud, whereas there is no finding of or evidence of fraud on the part of McDowell in these cases. In that case the agent was an Army Officer being compensated for his services to the Government by a fixed salary. In these cases McDowell was to be compensated only by his commissions. In that case the Army Officer agent had a secret agreement with the contractor for a share of the profits derived from the contract unknown to his superior officers, whereas in these cases McDowell had no secret agreement with anybody and

the Department was fully aware of the commission provision, having itself devised the whole plan of acquisition.

In view of the foregoing we earnestly submit that the judgment of the Circuit Court of Appeals of the Eighth Circuit in each of the cases at bar should be reversed.

Respectfully submitted,

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